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No. 89-333

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION and ROCK CREEK LIMITED PARTNERSHIP,

*Respondents.*

**On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether this Court should now overrule its decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), that the effect of section 27 of the Federal Power Act is limited to "the control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature*." (Italics added.)

Or, to put the same question in more general terms:

2. Whether the savings provision of section 27 of the Federal Power Act (which the Court's decisions make clear relates only to protection of state-conferred water rights from uncompensated takings) permits a state to regulate the manner of operation of a federally licensed hydropower project located on a non-navigable stream on federal land, where all water is returned to the stream and no other water user's rights are affected.

## PARTIES

The petitioner is the State of California, acting on behalf of the State Water Resources Control Board.

The respondents are the Federal Energy Regulatory Commission and the Rock Creek Limited Partnership.[1]

[1] The limited partners of Rock Creek Limited Partnership are Olympe Inc., Motherlode Hydro, Inc., and Cal Hydro Electric Power Co., all California corporations. The general partner of Rock Creek Limited Partnership is El Dorado Hydro, a general partnership of the above three corporations.



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## RESPONDENT'S BRIEF IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 877 F.2d 743 (9th Cir. 1989). That opinion affirmed the Federal Energy Regulatory Commission's Order in Response to Request for Declaratory Order and Providing for Hearing, reported at 38 F.E.R.C. ¶ 61,240 (1987), and its Order Denying Rehearing, reported at 41 F.E.R.C. ¶ 61,198 (1987).

## STATEMENT

### 1. Nature of the Controversy.

The Rock Creek Hydroelectric Project (the "Project") is a small-scale hydroelectric power plant located on Rock Creek, a small, non-navigable tributary of the South Fork of the American River, in El Dorado County, California. The Project does not have significant water storage capacity, but instead produces electricity by diverting water from the creek through a man-made tunnel to a powerhouse, where the water drives turbines that generate electricity. The water is returned to Rock Creek at its confluence with the South Fork of the American River, approximately 5,100 feet downstream from the point of diversion. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,117-18 (1987).

Both the Project and the creek are located entirely on federally owned land administered by the Bureau of Land Management, except for a small portion owned by the Partnership. Order Issuing License (Major), 23 F.E.R.C. ¶ 62,137, at 63,203 (1983) ("FERC License"); Order WR 87-2, at 47-48 (Cal. St. Water Res. Control Bd. Mar. 19, 1987). By virtue of its FERC License, the Project is entitled to use "all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project." FERC License, 23 F.E.R.C. at 63,204. Accordingly, the Project's operation does not affect the water rights of others. As even the State Board has conceded in related litigation:

> The State Water Board is not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.



Stipulation of Facts ¶ 17, *Rock Creek Limited Partnership v. State Water Resources Control Bd.* (E.D. Cal. No. S-87-523).

### 2. Grounds for Issuance of the FERC License.

In reviewing the June 1, 1982 license application for the Project, the Federal Energy Regulatory Commission ("FERC") considered the need for, and benefits to be derived from, the Project, the Project's economic feasibility, and the Project's potential environmental impact. *See* FERC License, *passim*. On April 29, 1983, FERC approved the Project and issued the License. *Id.*

In accordance with the statutory mandate of section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), FERC considered the "bypass flow"[2] levels that would be appropriate for the purpose of protecting the trout fishery in Rock Creek. FERC License at 63,201. Based upon its review of all available information, FERC concluded that "factors other than the quantity of available adult habitat" in Rock Creek "are limiting fish production," and that "the release of the minimum flows on an interim basis as proposed by [the licensee] would not adversely impact the fishery resources of Rock Creek." *Id.* Accordingly, FERC ordered that, until completion of a comprehensive

[2] The "bypass flow" is the water flow that is not diverted from the creek for power generation but instead is left in the portion of the creek between the point of diversion and the point of return.

fishery study, the Project "shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule . . .: May through September - 11 cubic feet per second (cfs) and October through April - 15 cfs." *Id.*, Article 37, at 63,204. In February 1984, approximately a year after the License was issued, the State Board issued the Project a permit to appropriate water incorporating identical bypass flows.

**3. The Challenged FERC Rulings.**

Although the State Board originally conformed its permit to the terms of the FERC License, in 1986 it convened hearings on whether the Project's state permit should be amended to raise substantially the bypass flow under which the Project must operate. In response, the Partnership petitioned FERC for a declaratory order resolving which requirements, state or federal, would prevail. On March 11, 1987, FERC ruled in response to the Partnership's petition that "the establishment of minimum flows is a matter beyond the reach of state regulation," 38 F.E.R.C. ¶ 61,240, at 61,773 (1987), that the flows stated in the FERC License prevailed over state requirements "irrespective of any action taken by [the State Board]" and that the "Rock Creek Limited Partnership shall release the flows specified in Article 37 of its [FERC License] until otherwise ordered by the Commission." *Id.* at 61,773, 61,774. In the same ruling, FERC also scheduled hearings to allow the State Board and other interested parties to present evidence as to whether FERC should increase the Project's bypass flows.[3]

[3] At those hearings, held later in 1987, California urged that the bypass flows be raised to 60 cfs in winter months and 30 cfs in summer. On November 16, 1987, the FERC administrative law judge issued an initial decision that the bypass flow should be raised to 20 cfs year round. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,122 (1987). All parties have filed exceptions to that ruling, which remain under submission with FERC pending action on California's instant petition.



## REASONS FOR DENYING THE WRIT

### I. THE COURT HAS ALREADY DECIDED THE ISSUE INVOLVED.

The question raised here by the State of California has already been decided authoritatively by this Court, first in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and then nine years later in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

*First Iowa* involved a proposed hydropower project that would divert water from the Cedar River at Moscow, Iowa, transport that water by canal eight miles to Muscatine, Iowa, on the Mississippi River, and there generate electricity as the water fell 101 feet to the level of the Mississippi. 328 U.S. at 157-58. In the process, the project would leave only 25 cfs of water in the Cedar River from Moscow downstream 29 miles to the Cedar River's confluence with the Iowa River. Iowa claimed this would hinder navigation and harm the river's fishery.[4] The project would

[4] 328 U.S. at 158-59. According to the State of Iowa, this diversion would result in "an absolute destruction of navigation or commerce" on the Cedar River, would "undoubtedly create a health hazard and nuisance," would "destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted," would inundate three United States highways and one state primary highway, and would make the lower

violate the terms of a state statute requiring that a permit be obtained and that "any water taken from the stream in connection with the project [must be] returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life." 328 U.S. at 164-66, 170 (emphasis omitted). The Federal Power Commission (FERC's predecessor) dismissed the developer's application for a license based upon failure to comply with section 9(b) of the Federal Power Act, 16 U.S.C. § 802(a)(2), which required submission of "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes." Although the Commission was of the opinion that the Iowa statute was preempted, *see* 328 U.S. at 161, it dismissed the case, ruling that the validity of the statute should be determined in the courts before it acted on the license application. *Id.* at 161-62.

This Court reversed the dismissal in an opinion which it characterized as "illustrat[ing] the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act." *First Iowa*, 328 U.S. at 156. The Court determined that the dismissal of the application under section 9(b) for failure to present satisfactory evidence of compliance with the Iowa statute was proper only if the statute

portion of the Cedar River "a dry run." Brief for State of Iowa, Intervenor at 4; Petition for Rehearing by State of Iowa, Intervenor at 5.



were valid. *Id.* at 166-67. Turning to the validity of the Iowa statute, the Court stated:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. . . . Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. . . .

*Id.* at 167-68. Thus, *First Iowa* made clear that the Act preempted all state regulation on those subjects which the Act placed under the regulatory authority of the Federal Power Commission, now FERC.[5]

[5] California argues in its petition that the legislative history of section 27 of the Federal Power Act leads to the conclusion that state water laws apply to federally licensed hydropower projects. That argument was extensively, and unsuccessfully, briefed by Iowa in *First Iowa*. Brief for State of Iowa, Intervenor, at 23-28; Petition for Rehearing by State of Iowa, Intervenor, at 17-21; Brief for First Iowa Hydro-Electric Cooperative, Petitioner at 11, 19 n.8, 22-24 & n.10, 31-35, app. 18-36 (reprinting excerpts from master's thesis of R.B. Snapp on legislative history of Federal Power Act), app. 37-45 (reprinting portions of legislative history); Brief for the Federal Power Commission, Respondent at 19-20, 38-39 n.23, 40 n.25, 48-50; *see also* Reply Brief for First Iowa Hydro-Electric Cooperative at 14-17 (apps. B-D). This Court concluded, however, that the legislative history supports the view that states cannot regulate the operations of projects licensed under the Federal Power Act and that the effect of section 27 is limited to state laws concerning proprietary rights to use water for irrigation, municipal, and similar uses. 328 U.S. at 173-74 (quoting Rep-

This Court then addressed and rejected Iowa's contention that section 27 of the Act preserved its right to regulate a federally licensed hydropower project:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

328 U.S. at 175-76.

California's characterization of *First Iowa*'s interpretation of section 27 as dictum is unwarranted. As noted above, the Court's finding that the Iowa statute was preempted was necessary to the decision: if the statute had been valid the Commission would have acted properly in insisting on satisfactory evidence of compliance under section 9(b). The issue of preemption was one of the Questions Presented in both the

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resentative LaFollette), 176-77 n.20 (discussing legislative history of Section 27), 179-81 & n.23. The petitioner's argument is no more availing in its repetition here.



project developer's petition[6] and Iowa's opposition.[7] Indeed, had the *First Iowa* case been concerned only with the "informational" effect of section 9(b), as California argues, the case would have involved nothing more than the Commission's refusal to license a hydropower project that never could operate legally. It is difficult to understand how such a refusal could constitute an abuse of discretion, much less give rise to an "important question of federal law" warranting review by the Court.

Federal jurisdiction in *First Iowa* was based on the navigability of the Cedar River. Nine years later, in *Federal Power Commission v. Oregon*, 349 U.S. 435, 437-38 (1955), the Court applied its *First Iowa* construction of section 27 to a project which, like the Rock Creek Project, was located on a non-navigable stream on federal land. 16 U.S.C. §§ 797(e), 817. There, Oregon challenged the Federal Power Commission's issuance of a license to a private developer for construction of a hydropower project on the Deschutes River in Oregon. The State contended that the license conditions did not provide adequate protection for breeding fish. 349 U.S. at 437. Relying on *First Iowa*, the Court again found exclusive federal authority to regulate federally licensed hydropower projects, saving state law from preemption only to the extent necessary to protect the vested water rights

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[6] Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 4 (question 6). *See also id.* at 2-5 (questions 1-4, 10, and 11).

[7] Intervenor's Resistance to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 3 (question 4); *see also* Brief for the Federal Power Commission, Respondent at 3 (question 3).

of others. *Id.* at 441-46. In the Court's view, there was

> no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, *provided that, as required by the Act, the use of the water does not conflict with vested rights of others.*

*Id.* at 444-45 (citing section 27) (emphasis added). Relying on section 27 and without even citing section 9(b), the Court invalidated Oregon's fishery protection measures:

> To allow Oregon to veto such use [of water by the project], by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision. No such duplication of authority is called for by the Act.

349 U.S. at 445 (citations to *First Iowa* omitted).

## II. *FIRST IOWA* AND *FEDERAL POWER COMMISSION v. OREGON* ARE NEITHER IN CONFLICT WITH NOR OVERRULED BY *CALIFORNIA v. UNITED STATES.*

Apparently recognizing that the Ninth Circuit's ruling in this case was mandated by *First Iowa* and *Federal Power Commission v. Oregon*, California argues that the doctrine of those cases has been silently overruled by *California v. United States*, 438 U.S. 645 (1978). *California*, however, involved the preemptive effect of a *different statute* with a *markedly different purpose and structure* and a savings provision with *substantially different wording*. The cases are not in conflict, but simply illustrate that different statutes can have different preemptive effects.



*California v. United States* involved the preemptive effect of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.*, not the Federal Power Act. The different purposes of the two acts can be seen clearly by comparing the Court's opinions in *California* and *First Iowa*. As the Court noted in *California*, the Reclamation Act did not impose a broad federal regulatory scheme, but instead "merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended." 438 U.S. at 651. In contrast, the Court in *First Iowa* characterized the Federal Power Act as designed "to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." 328 U.S. at 180. In view of these clearly different statutory purposes, it is not surprising that the Reclamation Act has a narrow preemptive effect while the Federal Power Act is broadly preemptive.

California argues that the similarity in wording of the savings provisions of section 8 of the Reclamation Act and section 27 of the Federal Power Act dictates that they be construed identically. The similarity, however, focuses on one common clause, upon which the remainder of the two provisions place substantially different limitations.

The Reclamation Act was designed to provide federal funding of irrigation projects in the arid West. *See California v. United States*, 438 U.S. at 664. The Federal Power Act, on the other hand, was designed to promote hydropower development through the efforts of thousands of licensees under supervision of a federal agency. It gives FERC broad authority per-

vasively to regulate the construction and operation of hydropower projects. By sharp contrast, the Reclamation Act's savings provision, section 8, specifically preserves state authority with respect to irrigation, the central subject of the Act. It also expressly states that in carrying out the provisions of the Act, the "Secretary of the Interior . . . shall proceed in conformity with such [state] laws." 43 U.S.C. § 383. While sharing some common language with section 8, section 27 does not purport to preserve state laws concerning the very purpose of the Act (hydropower development) and contains no analogue to section 8's command that federal actions be conformed to state requirements. In its entirety, section 27 states:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821.

Notably absent from section 27 is any mention of state laws concerning water used for hydropower generation or any parallel to section 8's requirement that the provisions of the Reclamation Act shall be carried out "in conformity with such [state] laws." 43 U.S.C. § 383. Had Congress intended to subordinate the Act's comprehensive regulation of hydropower projects to state laws concerning use of water by such projects, "the simple thing would have been to so provide." *First Iowa*, 328 U.S. at 178-79.[8]

[8] Differing constructions in different contexts of water law savings clauses is neither novel nor anomalous. Instead, it is a longstanding and well-accepted phenomenon that reflects the fact that savings provisions were used in several different acts with markedly different purposes. For instance, twelve years before *First Iowa*, the Court interpreted the Desert Land Act's savings provision, 43 U.S.C. § 321, as having a broad effect in saving state water laws from preemption. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-58 (1935). In *First Iowa*, the Supreme Court gave section 27 of the Federal Power Act, which contains the same phrase as that of the section involved in *California Oregon*, a narrow construction without even citing *California Oregon*. Thirty-two years later, in *California v. United States*, the Court gave section 8 of the Reclamation Act a broad construction without citing *First Iowa*.



If further evidence were necessary to establish that *California v. United States* was not meant to overrule *First Iowa*, it is supplied by the Court's continued citation of *First Iowa* since the *California* decision. *E.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982). Accordingly, post-*California v. United States* decisions have made clear that *First Iowa* remains valid and that there is no conflict in federal law which would warrant the Court's review of this case.

## III. CONGRESS HAS REFUSED TO CHANGE THE *FIRST IOWA* RULE.

The interpretation of the Federal Power Act first announced by this Court in *First Iowa* has been uniformly followed in the ensuing years. Courts, the Commission, and hydropower project operators all have proceeded on the basis that the Commission's

requirements as to project operation are authoritative. Indeed, the *First Iowa* rule forms the legal foundation upon which hundreds of projects have been constructed.

Consistent with the Supreme Court authority just cited, lower court adherence to the *First Iowa* rule has been frequent, long-continued and uniform. Thus, in *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165, 176 (9th Cir. 1964), the Ninth Circuit held that section 27 is limited to preserving a right to compensation where state-conferred rights are taken by a licensee under the Federal Power Act.[9] The Second Circuit has followed suit in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 478 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).[10] District courts also have followed *First Iowa*'s lead. *See, e.g., Mega Renewables v. County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986); *Town of Springfield, Vt. v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield, Vt. v. Vermont Env'tl Bd.*, 521 F. Supp. 243, 248-49 (D. Vt. 1981). Thus, the Ninth Circuit's decision in this case is clearly in

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[9] *See also Public Util. Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 670 n.6 (9th Cir. 1967), *cert. dismissed*, 396 U.S. 803 (1969); *Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *United States v. Central Stockholders' Corp.*, 52 F.2d 322, 330-32 (9th Cir. 1931) (section 21 of the Federal Power Act, 16 U.S.C. § 814, gives licensees the power of condemnation).

[10] *See also Board of Elec. Light Comm'rs of Burlington v. McCarren*, 725 F.2d 176, 178 (2nd Cir. 1983).



accord with settled law and the expectations of federal licensees under the Act.

In view of the long-established adherence to the *First Iowa* rule, any change should come from Congress rather than the Court. Where a question of statutory interpretation is presented, the doctrine of *stare decisis* has special force. *Patterson v. McLean Credit Union*, 491 U.S. ___, 109 S. Ct. 2363, 2370 (1989). In 1986, Congress considered the issue of state jurisdiction over federally licensed hydropower projects in connection with the Electric Consumer Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495 (Oct. 16, 1986). Prior to the passage of the Senate version of the ECPA, hearings were held by the Senate Committee on Energy and Natural Resources concerning the possible amendment of the Federal Power Act to vest in the states control over the appropriation, diversion and use of water by federally licensed projects. *See generally* 99 Cong. Rec. S4448-49 (April 17, 1986). Despite those hearings, no such amendments were made to the ECPA by the Committee or by the House or Senate. Instead, Congress merely amended sections 4 and 10 of the Federal Power Act to require FERC to consider recommendations submitted by state fish and wildlife agencies regarding pending license applications.

## IV. THE FACTS OF THIS CASE DO NOT PRESENT THE BROAD WATER RIGHTS ISSUES DISCUSSED IN THE PETITION.

California attempts to cast this case as a "water rights" case, Pet. at 21-23. On its facts, though, this case does not involve any issue of water rights. The Partnership, as private landowner and licensee of the United States, holds the riparian rights over the en-

tire section of the creek affected by the Project's operation. No upstream or downstream water rights holder is in any way affected. Nor does California law recognize any water right of a non-riparian owner for the maintenance of natural stream flows. *See Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979). Thus, as in *First Iowa*, 328 U.S. at 158, the only water rights at stake are those held, through ownership or license, by the Project developer. The only issue raised by the facts of this case is whether the State Board may add a regulatory layer to that of FERC.

Where state-conferred water rights *are* involved, the developer of a hydropower project must secure those rights by purchase or condemnation. As the Court stated in *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 377, 379 (1930), the Federal Power Act "does not purport to authorize a licensee of the Commission to impair [water] rights recognized by state law without compensation." *Accord, Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251-55 (1954). *Cf. Portland General Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, 176 (9th Cir. 1964) (section 27's only purpose is to ensure compensation for state-conferred water rights taken by federal licensees). This case does not involve the impairment of state water rights as claimed by California, but instead involves an attempt by the State Board to go beyond protection of water rights into the realm of hydropower project regulation. As the Court recognized in *First Iowa*, Congress has reserved that realm to FERC.



## CONCLUSION

For the reasons set forth above, California's petition for certiorari should be denied.

Respectfully submitted,

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